IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	Case No. 13-03121-01-CR-S-MDH
	)	
CARLIS A. SCOTT,	)	
	)	
Defendant.	)	

MOTION TO DISMISS INDICTMENT

COMES NOW the Defendant, Carlis A. Scott, by and through counsel, and hereby respectfully requests that this Court dismiss the Indictment herein due to the spoliation of evidence by the government. Defense counsel has recently been informed by the government that a portion of the evidence seized in this matter is indefinitely unavailable or lost. Because such constitutional defect cannot now be cured by the government, Defendant moves for this Court to dismiss this matter. In support of this motion, Defendant states the following:

BACKGROUND

On March 12, 2014, the Court entered a "Scheduling and Trial Order," which among other things required the government to produce all physical items of potential evidence in the government's possession or under their control:

> "This proceeding constitutes a specific request by the defense and the government for all information covered by this proceeding. In addition, during the conference, defense counsel requested all discovery to which

> defendant may be entitled pursuant to the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and the United States Constitution."[1]

On August 30, 2016, an investigator with the office of Defendant's counsel went to the location instructed by the government to review all physical evidence and found that certain evidence was not available and/or had been lost. All but one of the items contained in the list attached hereto as Exhibit "A" have never been physically produced for Defendant's review, although such was requested by Defendant and authorized by this Court's Scheduling and Trial Order of March 12, 2014.[2] Moreover, such therefore will not be available for use by Defendant as exculpatory evidence at any hearing or a trial of this matter.

ARGUMENTS AND AUTHORITIES

I. THE GOVERNMENT HAS VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS WHEN FAVORABLE EVIDENCE THAT WAS MATERIAL TO THE ISSUE OF GUILT BECAME UNAVAILABLE

Defendant's right to due process was denied when the Government informed Defendant's counsel that a portion of the evidence purportedly seized at the time of Defendant's arrest is indefinitely unavailable to Defendant for review, inspection and/or use at a hearing or a trial in this matter. Such purported evidence contained evidence that was material, favorable and exculpatory as to this Defendant in regards to the question of whether another person, Margaret Porter was the person in possession of the alleged firearm present in the vehicle that she was driving and was the vehicle that was the subject of a warrantless search at the time of Defendant's arrest. According to the report attached hereto as Exhibit "B- Coots Report," the firearm was found during the warrantless search of the vehicle in a fur coat and that such was contained in a trash bag full of other clothing that is not now in the possession of the government and is not now available for Defendant's review and investigation.

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[1] Case 6:13-cr-03121-JFM Document 18 Filed 03/12/14 Page 1 of 8.

[2] See Form 4569, attached hereto as Exhibit "A," purportedly prepared by Sarah Ehbrecht of the Bolivar Police Department, which under Comments/Inventory lists in the "Description of Items in Vehicle…" the following items: "2 Fur Coats, Assorted Clothing and Cosmetics, 2 CD Wallets, w/Cos. Iron, Computer Speakers, Cigarettes." The only item from such lists produced to Defendant has been one fur coat.

Due process requires fundamental fairness in the prosecution of a criminal case. *Lisenba v. California*, 314 U.S. 219, 236 (1941). Implicit in the concept of fundamental fairness is the idea that the defendant must have the opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984).

The United States Supreme Court has held that "[s]uppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83 (1963). As the Supreme Court discussed as to this issue in *United States v. Agurs*, 427 U.S. 97, 110 (1976):

> "If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it. *Cf. Giglo v. United States,* 405 U. S. 150, 405 U. S. 154… If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."

The proper inquiry for a reviewing court where the question is whether the Government violated Defendant's right to due process by suppressing evidence is: 1) whether the evidence was favorable to the Defendant; and 2) whether the evidence was material to guilt or punishment. *United States v. Bagley*, 473 U.S. 667 (1985). For purposes of this analysis, it does not matter whether the evidence was suppressed by the prosecutor or by the police. *Kyles v. Whitley*, 514 U.S. 419 (1995). Rather, the question is whether the evidence was suppressed by the government, for which both the prosecution and the police serve as agents. *Id*.

The ultimate responsibility for ensuring that exculpatory evidence is provided in accordance with *Brady* rests with the prosecutor. *Id*. at 438. A miscommunication between the prosecutor and the police that results in the suppression of exculpatory evidence is no excuse or defense for a *Brady* violation. *Id*. As the Supreme Court explained in *Kyles v. Whitley*, since “the prosecutor has the means to discharge the government’s *Brady* responsibility if he will, any argument excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government’s obligation to ensure fair trials.” *Id*.

A. The evidence would have been favorable to Defendant

Evidence is favorable to the defendant where it has a tendency to refute the charges brought against him by the government. See *Brady v. Maryland*, 373 U.S. 83 (1963). It is highly reasonable and appropriate to infer that evidence was favorable to the defense from the fact the purported evidence that is not available, the trash bag and the entirety of the clothing in the trash bag (which would be probative of the issue of whose clothing was in the trash bag), are now unavailable to the Defendant in these proceedings.

See *State v. Pike*, 162 S.W.3d 464 (Mo.2005) (spoliation doctrine creates an inference of bad faith on the part of the state when evidence is altered or knowingly disposed of). The Defendant's prior filing of his initial Motion to Suppress[3] established that the question of the accuracy of the police reports and actions at the time of the warrantless search of the vehicle and the Defendant's arrest would be at issue.

Additionally, the items missing now from Exhibit "A" would potentially have provided exculpatory evidence that the firearm in question was actually in the possession of another person, Margaret Porter, who was the driver of the vehicle in which the firearm was purportedly found.[4] It was also purported in the police reports that the firearm was found inside a fur coat that was within one of two trash bags of clothing, which allegedly contained not one, but two fur coats, and other clothing that appear from the evidence photos disclosed by the government to be female clothing. There were only two people travelling in the vehicle at the time of this incident: Margaret Porter and the Defendant. Ms. Porter is female and the Defendant is a male. Although police attempted in at least one of their reports to characterize the fur coat as the Defendant's, it is arguably a female type of coat. Moreover, the controlled substances found in the vehicle were only found within Ms. Porter's purse. To assume that other evidence of any crime

[3] Case 6:13-cr-03121-MDH Document 60 Filed 05/09/16

[4] Defendant requested all evidence seized by law enforcement and/or allegedly found by law enforcement in the vehicle searched, but were informed by the government that a portion of such evidence was not available, including, but not limited to, both trash bags of clothing in the rear of the vehicle, the clothing inside the trash bags other than one fur coat. See also, Exhibit "A," which lists many items beyond what is now available to Defendant by the government as part of the government's duty to provide discovery.

belonged to the Defendant is without probable cause and without merit. It is imperative, therefore, for the Defendant to be able to show through the exculpatory evidence of where the firearm was found – in a bag full of what could arguably be female clothing – that the firearm was not in his possession.

Defendant, in a previously filed Motion to Suppress, disputed the officers' versions of how such property's ownership was attributed on the property report and how such evidence was taken into custody by law enforcement. Those assertions are incorporated herein by reference. See, Case 6:13-cr-03121-MDH, Document 63, filed 08/16/2016.

Some or all of the items that are now not available for Mr. Scott's defense (the other clothing in the trash bags and the other items in Exhibit "A") would prove that this seizure was made without any reasonable suspicion or probable cause that a crime by the Defendant had occurred, and that the firearm in question was not located within the property of this Defendant. Thus, such spoliation of alleged evidence has violated the rights of this Defendant pursuant to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

B. The evidence was material to the question of guilt

The actions of the government that amounts to the spoliation of evidence favorable to the accused rises to the level of a violation of the Defendant's right to due process so as to require the reversal of his conviction and/or the dismissal of the charges when the evidence is material to the question of guilt or punishment. *United States v. Bagley*, 473 U.S. 667 (1985). The *Bagley* Court explained that evidence is material to the question of guilt "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id*. at 682. The term "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." *Id*. This standard applies whether the Defendant requested the production of evidence or not. *Id*.

In this case, the favorable evidence contained within the trash bags would be the clothing that the firearm was found in, a bag containing what is arguably female clothing. The government has already acknowledged that such evidence existed, but now Defendant is informed that it is indefinitely unavailable.

The trash bag full of clothing that the firearm was allegedly found in according to the reports of law enforcement officers was the best available evidence of the events that resulted in Defendant's arrest and the property seized because they were the only *objective* evidence of these events. Moreover, the trash bag of clothing, in which the firearm was found, was material to the legal question of who had possession of the firearm in question and, thus, to Defendant's guilt for the crime charged. Under these circumstances, the loss and/or disposal of the purported evidence constitutes a violation of Defendant's right to due process.

II. THE GOVERNMENT VIOLATED DEFENDANT'S RIGHT TO DUE PROCESS WHEN IT ACTED IN BAD FAITH IN ALLOWING EVIDENCE TO BE KNOWINGLY DISPOSED OF THAT WAS POTENTIALLY USEFUL TO DEFENDANT

The government violated Defendant's right to due process when it failed to preserve all of the evidence seized, including that taken as part of its warrantless search.

Since the entirety of the contents in the vehicle search were potentially useful and because the government acted in bad faith, or at the very least, with complete disregard for Defendant's due process rights, such Indictment should be dismissed.

The United States Supreme Court has recognized the difference between the government's failure to disclose materially exculpatory evidence and the failure to preserve evidence that is merely potentially useful to the defendant. *Arizona v. Youngblood*, 488 U.S. 51 (1988). While the question of whether the government and law enforcement of the City of Bolivar, Missouri, acting on its behalf acted in bad faith is irrelevant where the government either destroys or fails to disclose exculpatory evidence, the government's failure to preserve potentially useful evidence generally turns on the question of whether the government acted in bad faith. *Id*. The government has an affirmative duty to preserve evidence that might be expected to play a significant role in the suspect's defense. *California v. Trombetta*, 467 U.S. 479, 488 (1984). In *Arizona v. Youngblood*, the Supreme Court focused on the conduct of the State. The Court explained:

> The Due Process Clause of the Fourteenth Amendment, as interpreted in *Brady*, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta* that "[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often disputed." Part of it stems from our unwillingness to read the "fundamental fairness" requirement of the Due

> Process Clause as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.
>
> We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process . . . ."

488 U.S. at 58.

Defendant admits that the relevant case law reveals that Defendant has the burden of showing the evidence would be useful or that the disposal was done in bad faith.

Defendant believes that this has been demonstrated in this Motion and the Defendant's previously filed Motion to Suppress and Memorandum of Law in Support thereof, filed previously herein. See, *supra*. The evidence not available to Defendant herein is clearly exculpatory. Ms. Porter may attempt to testify that the clothing that the firearm was allegedly found in was not hers (to exculpate herself). However, if the Defendant would be able to physically present the clothing as evidence to show that it is indicative of female clothing, which would have belonged to Ms. Porter, would ***objectively*** exculpate the Defendant, Mr. Scott. As the 8th Circuit Court of Appeals in *United States v. Davis*, 690 F.3d 912, 925 (8th Cir. 2012) stated in quoting principles from the *Trombetta* case: "[t]he destruction of materially exculpatory evidence violates the defendant's due process rights, regardless of whether the government acted in bad faith." *See Trombetta*, 467 U.S. at 488–89, 104 S.Ct. 2528; *see also Youngblood*, 488

U.S. at 57, 109 S.Ct. 333 (explaining "the good or bad faith of the State [is] irrelevant when the State fails to disclose to the defendant material exculpatory evidence").

The issue in *Trombetta* was whether there was a constitutional requirement for the state to preserve evidence from a defendant's drunk driving test so that he could test it later; as a matter of routine policy, the police claimed that they did not preserve the breath samples. The Court held that due process only requires that evidence be preserved if it "might be expected to play a significant role in the suspect's defense." 467 U.S. at 488. The Court stated that this was a materiality standard similar to that under *Brady*, and "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 488.

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Court held that if the destroyed or lost evidence is only "potentially useful," but does not meet the materiality requirement of *Trombetta*, then "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 58. To be candid with the Court, this is different from the *Brady* analysis for suppression of evidence, which applies "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. 1197 (1963). However, "[T]o invoke *Trombetta*, a defendant can demonstrate that the government destroyed evidence possessing an "apparent" exculpatory value. 104 U.S. at 2534, 467 S. Ct. at 489. Although to trigger the *Youngblood* test, all that need be shown is that the government destroyed 'potentially useful evidence.'" *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994). It is clear in the police reports attached hereto as Exhibits ("B" - Coots Report) and ("C" – Ehbrecht Report) that the law enforcement who seized the firearm and other items of property from the vehicle have not been consistent or accurate in describing the property and its ownership. It can be surmised from this that there was a concerted effort to paint the picture that the firearm was in the possession of the Defendant when, in fact, all of the evidence (clothing in the trash bag, the trash bag, and other items within the vehicle which were not preserved) did not necessarily point in the direction of the Defendant being in possession of the firearm, but pointed in the direction of Ms. Porter. Defendant would have had a chance of showing such possession on her part if all of the evidence from the vehicle from which the firearm was purportedly found was available for the defense of this matter.

In *Illinois v. Fisher*, 540 U.S. 544, 124 S.Ct. 1200 (2004), the Court explained that if destroyed evidence was only "potentially useful," but did not rise to the level of exculpatory material as set forth in *Trombetta*, then the bad faith requirement must be established. 540 U.S. at 549, 124 S.Ct. at 1203. Defendant believes that he has clearly established that such lost or unavailable evidence would have been more than potentially useful.

A. The evidence would have been useful to Defendant.

In this case, the Defendant can meet all of the above-referenced tests. The trash bag of clothing that would have been probative evidence of who the firearm was in the possession of. The trash bag of clothing contained evidence that was useful, if not absolutely exculpable, given that there were two people in the vehicle and other person in the vehicle was a female and such clothing, if clothing worn by females would be objectively conclusive as to the issue of the ownership of the trash bag and the contents therein. In this matter it has already been shown that the only evidence found by law enforcement in their warrantless search that appeared to be evidence of an offense was found to be that of the female driver, Margaret Porter.[5] This coupled with the potential for Defendant to show that the firearm in question was in possession of Ms. Porter established the usefulness of such evidence under the tests in the cases cited herein above.

The defendant in a criminal case is entitled to evidence that is potentially useful to his defense, and the State's bad faith failure to preserve such evidence is a violation of due process. *Arizona v. Youngblood*, 488 U.S. 51 (1988). Evidence need not prove defendant's innocence beyond a reasonable doubt to be "potentially useful." Evidence is potentially useful when the evidence "might be expected to play a significant role in a suspect's defense." The standard for establishing that evidence is potentially useful is necessarily lower than the standard for establishing that evidence is exculpatory under *United States v. Bagley*, 473 U.S. 667 (1985). See also, *Arizona v. Youngblood*, supra.

[5] See, *State of Missouri v. Margaret Elizabeth Porter*, Case No. 13PO-CR00473-01, wherein on August 20, 2014, Ms. Porter pled guilty to Possession of a Controlled Substance with Intent to Distribute, Mo.Rev.Stat. 558.011; See also Defendant's Motion to Suppress and Memorandum of Law in Support of Motion to Suppress, Doc. 60 and 63 herein.

B. The government acted in bad faith, or at the very least, failed to act in accord with normal practice

The government is under a constitutional duty to act in good faith with regard to the preservation of evidence that might be useful to Defendant. See, *Arizona v. Youngblood*, 488 U.S. 51 (1988). Moreover, the government has a duty to respond in good faith to a defense request to preserve evidence. As the Supreme Court stated in *United States v. Agurs*, 427 U.S. 97 (1976), the failure of the prosecution to respond to a specific and relevant request is rarely excusable. *Id*. at 106.

A defendant's right to due process is violated where the government fails to preserve potentially useful evidence when the government's conduct is not in accord with "normal practice," even if the government acted without malice. In this case, the government acted in bad faith in failing to preserve the evidence of Defendant's arrest and warrantless search. The government, of which the prosecutor and the police are agents, had a general duty to preserve potentially useful evidence, especially since preservation of such evidence was timely requested by defendant. See, *Arizona v. Youngblood*, 488 U.S. 51.

Under these circumstances, the government cannot claim that it acted in good faith in failing to preserve the evidence. The City of Bolivar Police Department's failure to handle the evidence "in accord with their normal practice" and in accord with this Court's Order of March 12, 2014, constitutes an act of bad faith.

CONCLUSION

The Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution protects a criminal defendant from being convicted of a crime where the government fails to preserve materially exculpatory evidence, *California v. Trombetta* 467 U.S. 479, 489 (1984), as described herein above. There is no question that the trash bag of clothing meets the *Trombetta* tests. The missing evidence is (1) unique; (2) not obtainable by other means; and (3) the only 100% objective evidence available to a neutral factfinder as to who was in possession of the bag in which the firearm in question was allegedly found. Even if the Court would decide that the Defendant cannot unequivocally show that such evidence would exonerate him, it was bad faith for the law enforcement/government to not retain such evidence. The failure to preserve evidence, when done in bad faith, warrants the dismissal of the charge against Defendant.

WHEREFORE, Defendant hereby respectfully requests that this Court sustain this Motion, that the Indictment herein and this matter be dismissed, and for other relief that the Court deems appropriate.

Respectfully submitted,

/s/ David R. Mercer
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September 22, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2016, the foregoing document was electronically filed with the Clerk of the Court, and a copy was served on Mr. Casey Clark, Assistant United States Attorney, 901 St. Louis, Ste. 500, Springfield, Missouri 65806.

/s/ David R. Mercer
DAVID R. MERCER